



EMPLOYMENT TRIBUNALS

Claimant: Mr R Mauto

Respondent: Passion Home Care Ltd

HELD AT: Manchester

ON: 20 January and 17
March 2020

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person

Respondent: Ms A Asch-D'Souza, paralegal

JUDGMENT

The judgment of the Tribunal is that the respondent made an unlawful deduction from wages and the respondent is ordered to pay to the claimant the gross sum of £5377.50.

REASONS

Claims and issues

1. This was a claim of unlawful deduction from wages. At the outset of the hearing, we discussed the issues. It was common ground that there was an agreement that the claimant was to be paid on an hourly basis for hours worked and that the hourly rate was £9. The only area of dispute relevant to the complaint of unlawful deduction from wages was about the number of hours worked by the claimant during his employment. The claimant said that there had been an agreement that he should submit claims for fewer hours than actually worked and record the rest for payment later, because of the respondent's cash flow problems (or, alternatively, if payment was not made, he would be given shares in the business). The respondent denied

there was such an agreement and asserted that the hours the claimant submitted were those that he had worked and that he had been paid for all the hours worked.

2. During the course of the hearing, when giving evidence, Mr Muswe accepted that the claimant had completed three training courses at home for which he had not been paid and that the respondent should pay him for these on the basis of 45 minutes for each online training course.

3. The claimant had raised various other matters in his witness statement, not relating to a complaint of unlawful deduction from wages, and requested that the Tribunal make various orders which I explained were not within the Tribunal's power. I explained that I only had power to make orders relating to an unlawful deduction from wages, if I found that the respondent had not paid what was due.

4. The respondent, in its response, had raised an issue about early conciliation, arguing that the Tribunal should reject the claim because the name of the respondent on the claim form was not the same as the name of the prospective respondent on the early conciliation certificate. The name on the certificate was the respondent company. The claimant had named the respondent in box 2 of the claim form as Mr Beniyasi Muswe and Mrs Clara Muswe but referred to working at Passion Home Care Ltd in the details of claim. Employment Judge Sherratt had accepted the claim on the grounds that the difference was a minor error and it would not be in the interests of justice to reject the claim. The judge directed that the claim be served on Passion Home Care Ltd, the name in the particulars. The claim was served on "Passion Home Care Ltd FAO Mr B and Mrs C Muswe". I explained at the outset of the hearing that a judicial decision had been made to accept the claim by Employment Judge Sherratt. If the respondent thought that decision was wrong, the correct way to challenge it was by way of appeal. I said that I would proceed on the basis that the claim had been accepted and I had jurisdiction to consider it.

The hearing

5. The case came before me on 20 January 2020, listed for a three-hour hearing beginning at 2:15 p.m. By 4:30 p.m., it was apparent that we would not be able to complete the evidence that day and also that there had been failures of disclosure on both sides of potentially very significant documents. I, therefore, adjourned the hearing and relisted it to be continued with a one-day time estimate on 17 March 2020, making orders for disclosure of further relevant documents and the compilation of a supplementary bundle of all further documents disclosed.

6. I heard evidence from the claimant and from Mr Muswe, director of the respondent company.

Facts

7. The respondent is a home care agency, specialising in the provision of care services to vulnerable adults with dementia. Mr Beniyase Muswe has been a director of the company since 18 April 2019. Mrs Clara Muswe is the other director and is named in Companies House records as the person with significant control, owning more than 75% of the shares. Before, and during, the claimant's employment, Mr Muswe was also working full-time as a social worker. Prior to the claimant's

appointment, he had dealt with all administration and compliance matters for the respondent.

8. There is some dispute as to what position the claimant was appointed to. The claimant says this was a permanent position as office manager/compliance officer. The respondent asserts that the claimant was taken on as a care worker but it was agreed he would help Mr Muswe with some office duties, due to his past experience. It was common ground that the claimant carried out some administrative duties and matters to do with compliance during his employment, as well as doing some work as a care worker. It is not necessary for me to decide whether a job title was agreed and, if it was, what this was.

9. There was agreement that the claimant was to be paid on an hourly basis for hours worked at the rate of £9 per hour. The claimant did not work a fixed number of hours per week.

10. The respondent included in the bundle a pro forma contract for employees but did not provide a copy of any contract completed with the claimant's details and signed by the claimant and respondent. This is consistent with the claimant's evidence that he was not given a written contract. The claimant says there was what he described as a "gentleman's agreement" as to the terms on which he was to work, which was not put in writing by the respondent. I return to this later, when dealing with the claimant's document which he says are notes of a meeting on 14 January 2019 with Mr Muswe.

11. It is common ground that the claimant worked hours which fitted in with his childcare responsibilities. At the time, he was the primary carer, taking the children to school and collecting them at 1 p.m. There is agreement that the claimant worked in the office at least the hours Mr Muswe has recorded in "Diary 1" in the supplementary bundle and the hours which the claimant submitted for payment in What's App messages, which included some dates for which there was no entry in Diary 1. It is agreed that the claimant worked some mornings, in between school runs, and sometimes returned to the office to work with Mr Muswe in the evening, after his wife had returned and was able to look after the children and also that the claimant sometimes worked at weekends in the office.

12. There is a dispute as to whether the claimant was allowed to work at home, and did do at times, after collecting the children from school.

13. There is a dispute as to the number of hours worked by the claimant.

14. The claimant submitted requests for payment by What's App messages. The claimant was paid for the amounts claimed. The claimant says these claims did not represent all the hours worked; he submitted claims for the number of hours he was told to, after the respondent had done their budgeting. The claimant says that there was an agreement that he would be paid later for the remainder of the hours worked or, if payments were not made by 14 April 2019, he would be given shares in the business instead. The claimant says he was told by Mr Muswe that they were paying people from their own salaries since they were not making much. The claimant says that he understood from Mr Muswe that the amount he was told to claim each week was based on what the respondent had left after paying the carers.

15. The claimant says the tasks Mr Muswe wanted the claimant to do, and the hours spent doing these, were recorded in a diary, and signed by both the claimant and Mr Muswe, after Mr Muswe had satisfied himself that the tasks had been completed and the hours corresponded to the tasks set. No such diary has been disclosed and Mr Muswe says it does not exist.

16. The claimant resigned on 27 April 2019. His resignation letter included a request to make payment to him of £5539.50, which he said was the balance of wages owed to him. He wrote in his email:

“The first two weeks of joining PHC, I worked over 104 hours unpaid, because company had no money to pay me. Every week since then I worked an average of 48 hours per week but was told I could only get paid up to 6 hours per week as the office was not generating money and that the money was only coming from the field. I never complained as I was assured money will come as we get more clients and more staff.”

17. The claimant included in his resignation letter a table of the weeks in which he said he worked, the hours worked, hours submitted, amounts received and amounts owed. The information in this table corresponds, in large part, with the schedule of loss produced by the claimant in these proceedings, which, after some adjustments, including credit for payments made on 26 April and 3 May 2019, claims a total of £5377.50.

18. The claimant relies on two documents in particular, which he asserts to be contemporaneous documents created by him. The first is a note of a meeting between him and Mr Muswe on 14 January 2019 which he says records the “gentleman’s agreement” between them. The points noted include:

“If completed three months in role, to become shareholder if payments not met (14/04/19)”.

“To submit min hours and record the rest for late payments. (Week totals?).”

“Work at home/office cloud/backup drive.”

“No pay for two weeks induction (later pay).”

“Paid weekly/minimally??
Around 10 hours per week
paid from carers money (field)”.

19. The other document the claimant relies on is a document provided in disclosure before the resumed hearing, which the claimant says is a document where he noted down, from the diary each week, the hours which had been agreed by Mr Muswe as his hours of work.

20. Both these documents are handwritten and, in the manner in which they are written, including annotations, have an appearance of authentic notes. They are consistent with the account given in writing by the claimant in his resignation letter

and, in large part, with the details given in the claim form. The claimant, in the claim form, wrote that he had been instructed to submit claims for no more than 20 hours per week. The claimant, in oral evidence, explained this discrepancy by saying that he had not looked at his original notes when completing his claim form and that Mr Muswe had later said to him that they were comfortable with 20 hours because they were in a better place financially. I do not consider that this discrepancy undermines the authenticity of the notes of the agreement reached on 14 January 2019. I find the claimant made an error in completing the claim form without checking his original notes.

21. I find the notes of the meeting on 14 January 2019 to be an authentic contemporaneous document, created by the claimant on 14 January 2019.

22. I find that the record of hours worked is an authentic contemporaneous document, created on an ongoing basis by the claimant, week by week. The entries for the hours worked correspond to the hours claimed in the schedule of loss.

23. I prefer the evidence of the claimant to that of Mr Muswe in finding, on a balance of probabilities, that there was a diary which has not been disclosed, in which the claimant and Mr Muswe noted the hours which the claimant had worked and was to be paid for. This was not "Diary 1" or "Diary 2," which were disclosed prior to the resumed hearing by the respondent. I am assisted in making this finding by the respondent being shown to have altered a document being disclosed. The respondent disclosed what purported to be a transcription of What's App messages between the claimant and Mr Muswe. The claimant produced the original messages which demonstrate that Mr Muswe had not faithfully transcribed the messages. In respect of a message sent on 5 February 2019 at 7.05, the original message from Mr Muswe reads: "We also need to create certificates for Jane and Francisca. Chase up remaining references. Trafford is doing spot checks. How do we create them?" The purported transcription reads: "We also need to **write** certificates for JJ and FB. Chase up remaining references. Trafford is doing spot-checks for some of our clients today. How **to I** create them?" (my emphasis). Mr Muswe explained the changes by saying that he had transcribed what he had meant to say, rather than what he had actually said. I find, based on this, that Mr Muswe is prepared to manipulate evidence to support his own case. My findings below about the discrepancies between the entries in Diary 1, produced by the respondent, and the What's App messages, also support me in finding the evidence of the claimant to be more credible than that of Mr Muswe in relation to Diary 1 not being the diary in which the record of the claimant's hours was kept at the relevant time.

24. I find, on a balance of probabilities, that Diary 1 does not record all the hours worked by the claimant. I base this finding partly on my acceptance of the claimant's handwritten record of hours worked as being an authentic contemporaneous document but also on the basis of discrepancies between the hours recorded for the claimant's work in the Diary 1 and contents of What's App messages. These discrepancies are evidence that the claimant was working more hours than recorded in Diary 1. These are examples which may not be a complete list. The What's App messages from the claimant on 22 January 2019 suggest that, although he was going to be later than planned, he attended the office in the evening of 22 January 2019. If he had not managed to get there by 6.30 as indicated, I would have expected to see further messages to that effect. Diary 1 records the claimant as

working only 9-12 on 24 January 2019. However, What's App messages from that date show that Mr Muswe was asking the claimant to meet the claimant at the office at 5 p.m. and that the claimant was in the office at 17.32. On 31 January 2019, the claimant is shown by Diary 1 as working from 17.30 until 19.30. However, he sent a What's App message to a work contact at 10.33, suggesting he was also working in the morning. On 8 February 2019, the Diary 1 entry shows the claimant working 11-15.00. A What's App message at 15.24 shows the claimant was still working at that time. The Diary 1 entry for 12 February 2019 shows the claimant working 10 – 13.00; a What's App message shows he was working at 8.46. The Diary 1 entry for 14 February gives no hours work for the claimant; the What's App messages from 13 February show an arrangement to meet in the office on 14 February at 5 p.m.

25. Diary 1 contains no entries for work by the claimant after 13 March 2019, but the claimant submitted claims for work after that date and, in his resignation letter, acknowledged payments in respect of claims submitted for work up to and including the week beginning 25 March 2019. There are What's App messages indicating the claimant was working on various dates after 13 March 2019.

26. In the claimant's schedule of loss, he acknowledges receipt of payments of £63 and £90 on 26 April 2019 and 3 May 2019 respectively and gives credit for these payments.

27. I find that the claimant submitted claims to the respondent for payment for fewer hours than actually worked. For example, in relation to hours worked on 24 January 2019, the claimant claimed 3 hours, from 9-12, but the What's App message referred to above, shows the claimant also worked in the evening. I accept the claimant's evidence, supported by the document recording his notes of the meeting of 14 January 2019, that he claimed fewer hours than worked, at the request of the respondent and on the basis of a promise to be paid for the additional hours later (or, if not, to be given shares in the business). I find that the claims for fewer hours were made at the request of Mr Muswe, with payment for the balance to be made later, based on the evidence of the claimant, supported by his contemporaneous notes recording their "gentleman's agreement".

28. During the course of the hearing, when giving evidence, Mr Muswe accepted that the claimant had completed three training courses at home, on 14 and 22 February 2019, for which he had not been paid and that the respondent should pay him for these on the basis of 45 minutes for each online training course.

29. I find that the hours actually worked by the claimant were as recorded by him in the contemporaneous document he compiled on an ongoing basis.

Submissions

30. Both parties made oral submissions. Ms Asch-D'Souza invited me to prefer the evidence of the respondent as being more credible. She submitted that the evidence did not show that the claimant worked hours other than those submitted by him.

31. The claimant submitted that Mr Muswe had acknowledged the hours he had worked but had not disclosed the diary which would prove this.

The Law

32. There will be an unlawful deduction from wages if the full amount of wages due is not paid when it is due to be paid, unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction: Section 13(1) of the Employment Rights Act 1996. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Conclusions

33. I found that the claimant submitted claims for, and was then paid for, fewer hours than actually worked. I found that the claims for fewer hours were made at the request of Mr Muswe, with payment for the balance to be made later. I found that there was an agreement that the claimant would be paid later for these additional hours. I found that the actual hours worked were recorded in a diary which has not been disclosed by the respondent. I found that the claimant transcribed the weekly totals of hours worked from the diary onto the contemporaneous document compiled on an ongoing basis, which I was shown during this hearing.

34. The claimant was paid for the hours he claimed in his What's App messages, as directed by the respondent. He was not paid for the additional hours worked.

35. I found that the actual hours worked were those recorded in the claimant's record of hours, and as later set out in the table in his resignation letter and in his schedule of loss.

36. I conclude that the difference between what the claimant was paid and the amount due for the hours he actually worked, at the rate of £9 per hour, became due to him by no later than the termination of his employment. I conclude that the amount of the unlawful deduction is the gross amount of £5377.50 as set out in the claimant's schedule of loss. Since this is a gross amount, if any deductions fall to be made for tax and national insurance contributions under PAYE, these should be made by the respondent and the remaining net sum paid to the claimant.

Employment Judge Slater

Date: 18 March 2020

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

20 March 2020

FOR THE TRIBUNAL OFFICE

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**NOTICE****THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990**

Tribunal case number: **2410265/2019**

Name of case: **Mr R Mauto** v **Passion Home Care Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **20 March 2020**

"the calculation day" is: **21 March 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office